

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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IN RE: BAIR HUGGER FORCED AIR  
WARMING DEVICES PRODUCTS  
LIABILITY LITIGATION

MDL 15-2666 (JNE/DTS)

This Document Relates to:

*Petitta v. 3M Co.*, 16-cv-3878

**DEFENDANTS' RESPONSE TO  
PLAINTIFFS' SUPPLEMENT IN  
OPPOSITION TO DEFENDANTS'  
MOTION FOR PERMANENT  
INJUNCTION**

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Plaintiffs' supplement confirms the statement of facts in Defendants' Motion for Permanent Injunction and underscores the reasons this Court should enjoin further proceedings by Plaintiff John Petitta in Texas state court. In particular, it confirms once again that Defendants never agreed that Petitta's state court action could proceed if Petitta dismissed his federal court action with prejudice.

Plaintiffs' supplement consists of an email exchange between Defendants' counsel and Mr. Petitta's federal and state court lawyers in November and December 2016. In that exchange, Mr. Petitta's state court counsel (Albert Garcia) stated that he had spoken to one of Petitta's federal court counsel and "we have concluded that my lawsuit will continue in Texas State District Court on behalf of Mr. Petitta." ECF No. 2069-1 at 1. Mr. Petitta's lead federal court counsel (Ben Gordon, Jr., also one of Plaintiffs' Co-Lead Counsel) responded: "this confirms that we will agree to a stipulation of the MDL action, as long as mr. [sic] Garcia is comfortable moving forward in the TX action, as indicated." *Id.* Defendants' counsel did not ever agree, in this exchange or otherwise, that the Texas action could proceed if the federal action were dismissed with prejudice; there is no discussion at

all of the implications of a with-prejudice dismissal.<sup>1</sup> Contrary to Plaintiffs' assertion, the email exchange does not show that *Defendants* "intended to . . . pursue the concurrently and then pending state court action." ECF No. 2068 at 2.

More than three months passed after this email exchange, with no further action or communication by Petitta's counsel. Then, in April 2017, Petitta's federal court counsel proposed a stipulation for dismissal with prejudice of the federal action. ECF No. 1941 at 4 & DX3. Defendants' counsel confirmed with Petitta's federal court counsel that a dismissal with prejudice was intended, and consented to the stipulation. DX4. On April 5, 2017, Petitta's federal court counsel filed the stipulation. DX5. There was no mistake as to the nature of the stipulation: Plaintiffs' counsel stated in the April 20, 2017 MDL joint status report that Petitta's "MDL matter was dismissed with prejudice on April 5, 2017." ECF No. 2002-5 at 9. Even assuming Petitta's counsel was mistaken as to the *effect* of a stipulation of dismissal with prejudice – and Petitta's counsel has never suggested that is the case – that mistake would be irrelevant to this Court's decision. The stipulation remains and Petitta did not move to set it aside pursuant to Rule 60(b). As discussed in Defendants' Memorandum, the stipulation qualifies as an adjudication on the merits under both federal law and Texas law, and it therefore bars Petitta from relitigating the same claims in Texas state court.

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<sup>1</sup> Plaintiffs assert that "[u]ndersigned counsel didn't have a copy of the email thread," ECF No. 2068 at 2, when they filed their Opposition to Defendants' motion. This is not credible. The email thread includes Ben Gordon (one of those same "undersigned" counsel) and Albert Garcia, Petitta's state court counsel.

Dated: August 6, 2019

Respectfully submitted,

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